In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-627

CABLE-VISION, INC., a Florida Corporation, and TELE-MEDIA COMPANY OF KEY WEST, Its Successor in Interest,

Appellants,

vs.

WILLIAM A. FREEMAN, JR., HARRY S. PRITCHARD, JOHN W. PARKER, HARRY HARRIS and WILLIAM CARTER, As and Constituting THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, a Political Subdivision of the State of Florida,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

APPELLANTS' RESPONSE TO RULE 16 MOTION TO DISMISS AND/OR AFFIRM

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I.

INTRODUCTION

The parties will alternately be referred to herein as they stand in this Court, and as follows: Appellants, Cable-Vision, Inc., a Florida corporation, and Tele-Media Company of Key West, its successor in interest, as "CABLE-

VISION"; and Appellees, William A. Freeman, Jr., Harry S. Pritchard, John W. Parker, Harry Harris and William Carter, as and constituting The Board of County Commissioners of Monroe County, a political subdivision of the State of Florida, as "COMMISSIONERS". The symbols "A" and "AA" shall stand respectively for the appendices filed by appellants and appellees.

II.

APPELLEES' GROUNDS FOR DISMISSAL AND/OR AFFIRMANCE

Appellees based their Rule 16 Motion to Dismiss and/or Affirmance on the following reasons and grounds:

1. The subject appeal is not within the jurisdiction of this Court because it was not taken in conformity to statute or applicable Supreme Court Rules.

2. The appeal does not present a substantial federal question.

3. The purported federal question raised was not timely or properly raised in the state court of final appellate jurisdiction.

4. The purported federal question raised was not expressly decided by the state appellate court/courts of final appellate jurisdiction.

5. The judgment appealed rests on an adequate non-federal basis.

III.

ARGUMENT

APPELLEES' POINT 1

The subject appeal is not within the jurisdiction of this Court because it was not taken in conformity to statute or applicable Supreme Court Rules.

Commissioners' apparent contention is that Cable-Vision should have perfected its appeal to the Supreme Court of the United States within ninety days from final disposition of this action by the District Court of Appeal for the Third District of Florida, on the basis that the decision of the District Court of Appeal was the decision of a Court of final appellate jurisdiction. Commissioners are mistaken in that contention. Quite to the contrary, if Cable-Vision had not sought appellate review in the Florida Supreme Court, the Motion to Dismiss or Affirm would be well taken. Cable-Vision sought direct appellate jurisdiction of the Florida Supreme Court and when that Court granted Commissioners' Motion to Dismiss, Cable-Vision filed a Petition under Florida Statutes, Section 59.45, requesting the Supreme Court of Florida to consider the appeal as a Petition for Certiorari. Both of those actions in the Florida Supreme Court were jurisdictional prerequisites to the filing of appeal in this Court. In the case of *Matthews* v. *Huwe*, 269 U.S. 262, this Court passed directly on that question in granting a motion to dismiss an appeal for failure to exhaust all state remedies. As this Court stated:

> "Another reason why the motions to dismiss should be granted, even if the foregoing conclusion were wrong, is that the plaintiffs in error did not exhaust all their remedies for review by the supreme court of

the state. After their petitions for writs of error as of right were denied, they had under the Ohio practice the right to apply to the supreme court in its discretion for writs of certiorari to bring the cases to that court for its consideration. No such application was made." 269 U.S. at 265.

Whether the Supreme Court of Florida had direct appellate jurisdiction of this case or the right of discretionary review under certiorari, Cable-Vision was required to attempt review in the Supreme Court of Florida as a jurisdictional prerequisite to the filing of this appeal.

As to the Court to which the appeal is directed, the Notice of Appeal is filed correctly in the Court having possession of the record, to-wit: the Circuit Court in and for Monroe County, Florida. Although the notice of appeal refers to appeal from the Supreme Court of the State of Florida, certainly no prejudice can result to any party to this appeal if that designation should turn out to be an error. Appellant Cable-Vision was and is in doubt as to whether this appeal is actually directed to the Supreme Court of the State of Florida or the District Court of Appeal for the Third District. Dismissal of this appeal on such a technical ground would be a basic denial of justice and not in conformance with previous decisions or practice of the Supreme Court of the United States.

APPELLEES' POINT 2

The appeal does not present a substantial federal question.

Prior to the instant litigation, Cable-Vision was the holder of a thirty year exclusive franchise for television services throughout Monroe County, Florida. As a result of the Florida Court decisions herein, Cable-Vision now

faces direct competition from the Grantor of its original franchise, the Commissioners, and in addition, now holds a non-exclusive franchise, so that the Commissioners, if they should choose, could grant additional non-exclusive franchises for cable television services throughout Monroe County. What was before this litigation a very valuable exclusive franchise is now a non-exclusive franchise of much less value—perhaps even worthless.

It is hard to imagine a more substantial federal question than the impairment by state action of previously existing contractual rights. The United States Court of Appeals for the Sixth Circuit stated it well in the case of *Ohio State Life Insurance Company* v. *Clark*, 274 F.2d 771, cert. denied 363 U.S. 828 (1960), when the Court stated:

> "The rights which the appellees have in the surplus of Columbus Mutual are protected by Article I, Sec. 10, of the United States Constitution which prohibits the impairment by a state of a contract obligation. It is not a question of degree; *under the Constitution it is not to be impaired at all.*" 274 F.2d at 778-779. [Emphasis supplied]

APPELLEES' POINTS 3 AND 4

3. The purported federal question raised was not timely or properly raised in the state court of final appellate jurisdiction.

4. The purported federal question raised was not expressly decided by the state appellate court/courts of final appellate jurisdiction.

Appellees' Points 3 and 4 will be argued together since they are so closely interrelated. Appellees take the position that the purported federal question raised was not timely or properly raised in the state court of final appel-

late jurisdiction, nor expressly decided by the state appellate court of final appellate jurisdiction. The fallacy of that argument is evident by a reading of the complaint filed by Commissioners and especially Paragraphs 7 and 8 thereof which read as follows:

> "7. That the obtaining of a license and the erection and operation of a broadcasting service to the citizens and residents of Monroe County for the purpose of transmitting the signals of a television broadcast station or another translator station, would not in the judgment or opinion of the plaintiff tend to lessen or impair the quality or the efficiency of the operation of the business being operated by the defendant, CABLE-VISION, INC., under its franchise nor would it have any undue adverse impact upon or seriously interfere with the primary business purposes or operations of said franchise service by the defendant CABLE-VISION, INC.
>
> The obtaining of a license for a translator station or stations and the erection and operation of such station or stations by the plaintiff would be a public purpose and for public good and not otherwise prohibited by law.
>
> "8. The plaintiffs are in doubt as to whether or not the acts of the legislature, to wit: Chapters 65-1916 and 65-1927 Laws of Florida, 1965, are constitutional although the plaintiffs believe and so believing allege that said acts are unconstitutional in that they seek to confer upon the defendant, CABLE-VISION, INC. a license or franchise to operate a television service which service is regulated solely and exclusively by the Federal Communications Commission, an agency of the United States Government.

> Alternatively, the plaintiffs allege that the obtaining of a license by the plaintiff to operate a translator broadcasting service to the citizens and residents of Monroe County would not result in an impairment of the franchise of the defendant, CABLE-VISION, INC. or of any of the services which it may supply although large numbers of persons, citizens and residents of Monroe County are not being served by the defendant, CABLE-VISION, INC. under its franchise."

In Cable-Vision's Answer, it responded to those allegations of Paragraphs 7 and 8 of the Complaint as follows:

> "7. Defendant denies the allegations of Paragraph 7 of the Complaint.
>
> "8. Defendant denies the allegations of Paragraph 8 of the Complaint."

Appellee's Point 4 is conclusively rebutted by the following direct quote from the Opinion of the District Court of Appeal for the Third District as it appears on page 13 of the Appendix to the Jurisdictional Statement:

> "Cable-Vision contends that County Ordinance 5-1973, authorizing translator stations is a constitutional impairment of contract. This is not so because the trial court found, after taking testimony, which was uncontroverted, that there was a distinct difference between a cablevision system and the operation of a television broadcast translator system."

APPELLEES' POINT 5

The judgment appealed rests on an adequate non-federal basis.

Cable-Vision contends that there is no non-federal basis on which to sustain the opinion of the District Court

of Appeal for the Third District of Florida. That Court held, again from page 13 of the Appendix to the Jurisdictional Statement, as follows:

> "In view of the fact that Chapter 65-1916 provides for an exclusive franchise and Chapter 65-1927, which came after it, provides for a non-exclusive franchise, the Court, under the statutory construction applicable, properly concluded that the franchise itself was not exclusive as to all forms of television reception."

In other words, the Florida Legislature created an exclusive franchise and then by later statute reduced it to a non-exclusive franchise. It is difficult to imagine a more obvious and blatant case of state action impairing the obligation of a previously existing contractual right.

CONCLUSION

For the foregoing reasons, Cable-Vision respectfully submits that the Court should deny the Motion to Dismiss and/or affirm, take jurisdiction of this case and set it for oral argument and the filing of briefs.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, MICHAEL G. KUSHNICK, one of the attorneys for Cable-Vision, Inc., a Florida corporation, and Tele-Media Company of Key West, Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1976, I served copies of the foregoing Appellants' Response to Rule 16 Motion to Dismiss and/or Affirm on the several parties thereto as follows:

1. On William A. Freeman, Jr., Harry S. Pritchard, John W. Parker, Harry Harris and William Carter, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorneys of record as follows:

Mallory Horton, Esquire, Horton and Perse
410 Concord Building, Miami, Florida 33130
Paul E. Sawyer, County Attorney for Monroe County
P. O. Box 571, Key West, Florida 33040

2. On the State of Florida, by mailing a copy in a duly addressed envelope with first class postage prepaid, to its attorney of record as follows:

Tom Harris, Esquire
Assistant Attorney General
Office of the Attorney General
The Capitol—Department of Legal Affairs
Tallahassee, Florida 32304

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